

¹ P.H. Trans. (July 1, 2004) at 4.

The Judge concluded the July 1, 2004, preliminary hearing by stating the parties would be given an opportunity to complete their evidence. Consequently, on October 7, 2004, and May 4, 2005, Debora Hudacek, who was doing business as D. P. Hudacek Contracting on the date of accident, testified by deposition. And on November 22, 2004, claimant testified again by deposition.

On October 3, 2005, Judge Foerschler issued the Preliminary Decision, which denied claimant's preliminary hearing request for medical benefits. The Preliminary Decision reads, in pertinent part:

This matter of benefits for a 2001 ankle injury originally appeared on the preliminary docket on July 1, 2004. It was continued then to complete the testimony mostly of the alleged employer, who had no apparent insurance coverage. Subsequent presentations were made October 7, 2004, beginning with Mrs. Hudacek's deposition and May 4, 2005 a continuation of that and also of Claimant's additional testimony done November 22, 2004. The contradictions about Claimant's "employment" by her, apparent at the hearing, were not substantially clarified by this evidence, so the benefits for which payment is sought were obtained long ago by Claimant and there seems no reason now to adjudicate those issues before a regular hearing. Order denied.

Claimant contends Judge Foerschler erred. Claimant avers the Judge denied his request for preliminary hearing benefits because the Judge apparently concluded he was not respondent's employee on the date of his accident. Consequently, claimant argues the issue now before the Board is whether claimant was working for respondent as an employee or as an independent contractor. Claimant requests the Board to reverse the Preliminary Decision and award him the medical benefits he requests.

Conversely, respondent and the Workers Compensation Fund (Fund) argue the Judge did not decide any of the compensability issues and, therefore, there is nothing for the Board to review. Accordingly, respondent and the Fund request the Board to dismiss this appeal.

The issues before the Board on this appeal are:

1. Did Debora Hudacek have a payroll or expect to have a payroll that would subject claimant's accidents to the provisions of the Kansas Workers Compensation Act?
2. If so, did claimant prove he was an employee of Ms. Hudacek at the time of his accidents?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, this Board member concludes claimant has failed to prove for preliminary hearing purposes that it is more probably true than not that he was an employee of Ms. Hudacek when he injured his left ankle in January and April 2001. Consequently, claimant's request for preliminary hearing benefits should be denied.

Although Ms. Hudacek is correct that the Judge's decision does not specifically address the questions of payroll or whether claimant worked for Ms. Hudacek as an employee or independent contractor, for judicial economy, the Board will not remand these claims for specific findings but, instead, treat the Preliminary Decision as an implicit finding that claimant failed to sustain his burden of proof.

Ms. Hudacek began doing business by purchasing and renovating houses. Gradually, Ms. Hudacek began contracting renovating services for others. And in approximately July 2001, Ms. Hudacek incorporated her business activities. Nonetheless, at all times relevant to these docketed claims, Ms. Hudacek's business activities were conducted as a sole proprietorship.

Based upon the present record, claimant has failed to prove he was working for Ms. Hudacek as an employee at the time of his accidents. It appears claimant first appeared at the job site and worked for Ms. Hudacek's brother, Robert, whom Ms. Hudacek used to perform certain jobs in her remodeling projects. According to Ms. Hudacek, her brother could not be relied upon to pay claimant and, therefore, claimant came to her to request direct payment from her and to be treated as a separate subcontractor. Ms. Hudacek's brother did not testify.

Ms. Hudacek denies that she hired claimant as an employee and she denies that she paid claimant on an hourly basis. Conversely, Ms. Hudacek contends she paid claimant based upon the specific project he performed. It is uncontradicted that Ms. Hudacek did not withhold taxes from claimant's pay but, instead, treated him for tax purposes as an independent contractor. The copies of the cancelled checks that Ms. Hudacek introduced into evidence do not indicate that claimant was paid on an hourly basis.

As in many cases, there are factors in claimant's relationship with Ms. Hudacek that support his claim of being an employee. On the other hand, other factors support Ms. Hudacek's assertion that claimant was an independent contractor.

Considering the nature of Ms. Hudacek's contracting business in January and April 2001 and the manner that she conducted that business activity, the present record fails to

prove claimant was working for Ms. Hudacek as an employee on the dates that he was injured. In short, claimant has failed to prove his left ankle injury is subject to the Workers Compensation Act.² Accordingly, the Preliminary Decision should be affirmed.

As provided by the Workers Compensation Act, preliminary hearing findings are not final but subject to modification upon a full hearing on the claim.³

Based upon the above, the issue regarding Ms. Hudacek's payroll need not be addressed.

WHEREFORE, the undersigned Board member affirms the October 3, 2005, Preliminary Decision entered by Judge Foerschler.

IT IS SO ORDERED.

Dated this ____ day of January, 2006.

BOARD MEMBER

c: Timothy M. Alvarez, Attorney for Claimant
Mark E. Kolich, Attorney for Respondent
Michael R. Wallace, Attorney for Fund
Robert H. Foerschler, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

² See K.S.A. 44-505(a).

³ K.S.A. 44-534a(a)(2).